In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1773

TEXAS INTERNATIONAL AIRLINES, INC., et al.,
Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION

JOHN L. HAUER
CLARICE M. DAVIS
WILLIAM M. BYRD, JR.
2800 Republic Nat'l Bank Bldg.
Dallas, Texas 75201

HERBERT D. KELLEHER
GARY A. BARRON
Suite 620, 711 Navarro
San Antonio, Texas 78205
Attorneys for Respondent
Southwest Airlines Company

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OPINIONS BELOW

The opinion of the District Court is reported at 396 F. Supp. 678. The opinion of the United States Court of Appeals for the Fifth Circuit, review of which petitioners seek, is reported at 546 F. 2d 84.

The opinion of the District Court in *City of Dallas, Texas, et*

al. v. Southwest Airlines Co., et al., declaring certain of the rights of respondent which petitioners have attempted to relitigate in state court, is reported at 371 F. Supp. 1015. The opinion of the United States Court of Appeals for the Fifth Circuit affirming that decision is reported at 494 F. 2d 773.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Does the Due Process Clause guarantee the right of a private party, with no personal or peculiar legal claim, to seek judicial enforcement of a public ordinance against another private litigant, after the governmental unit responsible for enacting the ordinance has been prohibited in prior litigation from enforcing that ordinance against the same litigant?

2. Do principles of comity prohibit a federal court from enjoining state court litigation in order to protect and effectuate a prior federal judgment based on settled principles of state law, rendered in a suit brought by units of state government under the court's federal question jurisdiction?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment V. (Appendix E to Petition).

2. Title 28, United States Code, Section 2283. (Appendix F to Petition).

3. Texas Constitution, Article 11, Section 5. (Appendix G to Petition).

4. Texas Aeronautics Commission Act, Texas Revised Civil Statutes Annotated, Article 46c-6, Subdivisions 1 and 3. (Appendix H to Petition).

5. Texas Municipal Airports Act, Texas Revised Civil Statutes Annotated, Article 46d-7. (Appendix I to Petition).

6. 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Ft. Worth. (Sections 2.1G and 9.5A Reprinted in Appendix J to Petition).

STATEMENT OF THE CASE

Southwest Airlines Co. ("Southwest" or "Southwest Airlines") sets forth its own Statement of the Case in order to correct inaccuracies and to supply omissions in petitioners' Statement.

This is the third manifestation before this Court of the decade long, and seemingly unending, series of lawsuits fostered by Civil Aeronautics Board ("CAB") certificated air carriers with a view toward eliminating their intrastate competitor, Southwest Airlines. Staggering as they are, the reported decisions constitute

only the prominence of a mountain of unreported administrative and judicial determinations costing Southwest, *in toto,* well in excess of $2,500,000 in legal fees and expenses. *Southwest Airlines Co. vs. Texas International Airlines, Inc., et al.,* 396 F. Supp. 678 (N.D. Tex. 1975) , aff'd 546 F.2d 84 (5th Cir. 1977), on pet. for cert.; *City of Dallas, Texas, et al. vs. Southwest Airlines Co., et al.,* 371 F. Supp. 1015 (.N.D. Tex. 1973), aff'd 494 F2d 773 (5th Cir. 1974). cert. den'd. 419 U.S. 1079 (1974) ("Southwest I"); *Texas Aeronautics Commission, et al. vs. Braniff Airways, Inc., et al.,* 439 S.W.2d 699 (Tex.Civ.App. - Austin, 1969) , rev'd 454 S.W.2d 199 (Tex. Sup. 1970) , cert. den'd. 400 U.S. 943 (1970); *Texas International Airlines, Inc., et al. vs. Civil Aeronautics Board, et al.,* 473 F.2d 1150 (D.C. Cir. 1972); *Texas Aeronautics Commission, et al. vs. Betts,* 469 S.W.2d 394 (Tex. Sup. 1971).

A judge of the United States Court of Appeals for the District of Columbia Circuit and the Civil Aeronautics Board itself have characterized the actions of its carriers in terms of "harassment." *Texas International Airlines, Inc., et al. vs. Civil Aeronautics Board, et al., supra* at 1156; CAB Order No. 72-6-12. The Texas Supreme Court has been compelled to prohibit one of its Austin District Court judges from granting repeated and excessive injunctive relief against Southwest Airlines, stating:

> . . . However, the limited record before us shows that Southwest proposed to operate in compliance with the provisions of Certificate Number 22, and is in violation of no rule of the Commission or law of the State of Texas or the United States. The injunctive relief requested in the trial court and that granted is unnecessary. It interferes with this court's former judgment which this court will not allow. The order of June 16, 1971, has now expired, but we order that the trial court cease further interference with this court's former judgment by granting injunctive relief. *Texas Aeronautics Commission, et al. vs. Betts,* 469 S.W.2d 394, 399 (Tex. Sup. 1971)

And, at the instance of the United States Department of Justice and as a consequence of their anticompetitive actions against Southwest, several of the CAB carriers are presently under grand jury investigation for violation of the federal antitrust laws.

Judge Wisdom states in the "Conclusion" to his opinion below:

> This is the eighth time in three years that a federal court has refused to support the eviction of Southwest Airlines from Love Field. Precisely worded holdings and deference to state authorities by the federal judiciary have only generated more suits, appeals, and petitions for rehearings. . . . " 546 F.2d at 102 (Pet. App. 35a)

The immense penumbra hanging over this case explains why this is so.

Narrowly viewed, this litigation concerns only Southwest's exercise of its "federally declared right"[1] to provide intrastate commuter air service through Dallas' downtown airport, Love Field ("Love") , rather than through the outlying Dallas-Fort Worth Regional Airport ("DFW") , without the harassment of repeated litigation designed to overturn the federal courts' declaration of that right. In comparison to District of Columbia air service, Love Field is the equivalent of Washington's National Airport, through which Eastern Airlines provides its New York and Boston shuttle service, and DFW is the equivalent of Virginia's Dulles Airport, through which long haul flights to and from Washington are provided. (R. 595)*

[1] 546 F.2d at 103 (Petitioners' Appendix 36a).

*Record references are to the printed Appendix filed in the Circuit Court of Appeals in Cause No. 73-2478, which was Cause No. 74-324 in this Court on prior Petition for Certiorari.

Eastern's short haul shuttle service could not possibly survive at Dulles, and Southwest's short haul commuter service could not survive at DFW. (R. 1473) During the CAB's Dallas-Fort Worth Regional Airport Investigation, Docket No. 13959, Braniff Airways, Inc. ("Braniff"), which is headquartered in the City of Dallas ("Dallas"), and the City of Dallas, as well, presented extensive evidence showing that Dallas generated approximately eight (8%) percent of the air passengers in the area and that short haul (under 300 miles) passenger traffic would be drastically inconvenienced and dramatically reduced if the CAB should designate Fort Worth's outlying Greater Southwest International Airport ("GSIA") as the sole CAB air carrier airport. (R. 1911-12; 4900-5088; 5095-5329) DFW is as far from Dallas as GSIA, and Braniff was the principal short haul carrier in the Dallas market prior to entry by Southwest. (R. 1419; 1426; 1913-14)

On June 18, 1971, Southwest commenced its air service to Houston through that City's outlying Intercontinental Airport. Only complete transference of such service to Houston's downtown Hobby Airport saved Southwest from bankruptcy. (R. 1298-99) Similarly, forcing Southwest to serve Dallas through DFW will bankrupt the airline. (R. 1473) That is why "narrowly viewed" this case concerns only Southwest's right to serve Love Field, but, broadly viewed, it concerns Southwest's right to survive. And it also concerns the right of the public to continue to receive far superior air service at fares approximately 50% below those normally charged for coach accommodations by the CAB air carriers, a comparison which has provided the primary impetus in the Congress for exposure of those carriers to more competition through deregulation of the entire interstate airline industry.

What are the discrete origins of the Love Field litigation itself?

In 1962, CAB certificated air carriers served the City of Fort Worth, Texas ("Fort Worth") through GSIA and Dallas through Love Field, although the two airports are only twelve air miles apart. (R. 1972) As testified to by Mr. Henry L. Newman, Director of the Southwest Region for the Federal Aviation Administation ("FAA"), such an arrangement became "an economic burden on the airlines to the point that the service to both cities was being jeopardized." (R. 544) In large part, as related by Mr. Newman, this burden resulted from the advent of commercial jet aircraft, which "are just a lot more costly. . . , it's just completely uneconomical for jets to make landings at such close proximity." (R. 958)

Motivated by their own economic problems, the CAB air carriers prevailed upon the CAB to institute the Dallas-Fort Worth Texas, Regional Airport Investigation, Docket No. 13959, which commenced on August 20, 1962, pursuant to CAB Order No. E-18719. (R. 1971) This Order recites that regional airport investigations are "a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment. . . ."

Thereafter, the CAB held hearings in which the issue presented was whether or not the certificates of its carriers should be amended so as to require them to serve only Love Field or GSIA. The FAA appeared before the CAB and advocated selection by the CAB of GSIA as the sole CAB air carrier airport. (R. 896) Instead, the CAB granted Dallas and Fort Worth ("Cities") time to agree upon either GSIA or Love as such airport. Order No. E-21341. Because of inflamed municipal

rivalries, the Cities could not so agree and, hence, they decided to build gigantic DFW at Grapevine, Texas, which is midway between the two Cities and just north of GSIA. (R. 630; 1419; 1426) The CAB did not envision, nor order, the construction of DFW, and, in fact, it later terminated its Regional Airport Investigation without amending the certificates of its air carriers so as to require them to serve DFW. Order No. 73-9-82

When the FAA learned of this surprising DFW decision in September of 1965, Mr. Henry L. Newman flew to Washington, D.C., and, at an informal conference, obtained an oral commitment from General McKee, then Administrator of the FAA, for Federal grants under the Federal Airport Act of 1946, ch. 251, 60 Stat. 170. (R. 896) Mr. Newman testified that:

> . . .one of the things that General McKee said to me was this, " . . .whatever we do today means that we're committed to follow through on the development of this airport." (R. 897)

The first FAA grant to DFW, for land aquisition, was made on June 24, 1966. (R. 896)

The foundation for the statements made in footnote 1 on page 4 of the Petition, to effect that the FAA "insisted" on the closing of Love Field to scheduled flights as a prerequisite to the funding of DFW, is Mr. Newman's additional testimony that General McKee had one major question during their September, 1965 meeting: "What assurance do we have that this new airport is going to be used by the airlines?" (R. 897) Mr. Newman reportedly thereupon told General McKee:

> . . .very emphatically that it was the determination. . .that one of the basic commitments on this airport would be that if this airport was developed, that all of the airlines would transfer their activities to the new airport, and had it not been for that decision, the FAA would not have concurred in the development of this airport or the commitment to put the what is now 60 some million, and I assume will be substantially greater than that in the years to come. (R. 897)

This hearsay testimony as to an oral exchange between two FAA officials, wherein Mr. Newman apparently purported to speak for the air carriers, the CAB, and the Texas Aeronautics Commission ("TAC"), constitutes the only "evidence" in the entire history of this case of any federal "action" designed to insure that all airlines would serve DFW. There is no federal hearing, rule, regulation, decision, order, or grant agreement, by the FAA or the CAB, which requires either federal or state airlines to serve DFW. The initial FAA grant, committing the FAA "to follow through on the development of this airport," was made in 1966, long before *anyone* even attempted to insure that *any* air carrier would serve DFW. In short, the FAA never "insisted that it would not grant federal funds to DFW unless Love Field was closed to scheduled flights" and if, as petitioners state, "all parties recognized that unless Love Field was substantially closed to scheduled traffic it would be impossible to generate revenue at DFW sufficient to pay its cost," they were wrong. In fact, Braniff served Love Field in competition with Southwest after the opening of DFW; rented, from Dallas, additional space next to Southwest in the vacated American Airlines concourse so that it could compete more effectively; and commenced service between Love and Austin, Texas, a route which Southwest did not even serve. Texas International also served Love Field after DFW began operations. The certificates of the CAB air carriers today permit them to serve either DFW or Love Field, or both, at their discretion. No CAB air carrier has ever been ordered to leave Love or to serve DFW. Despite this

and the fact that Southwest Airlines has also been serving Love Field, DFW has not only been meeting all of its costs for the past three and one-half years of its operation, but recently reported a $1,254,856.27 refund to its carriers of excess landing fees previously paid to the Airport Board. Dallas-Fort Worth Airport, Annual Report for fiscal year ending September 30, 1975.

Having agreed upon the Grapevine location, the Cities proceeded to arrange funding for DFW. The citizens of Dallas County voted down financing for an autonomous Regional Airport Authority authorized by the Texas Constitution, whereupon the two City Councils, by contract, created the Dallas-Fort Worth Regional Airport Board ("Airport Board") to act as an administrative arm of both Cities with respect to the construction and operation of DFW. (R. 8-9; 1580-81; 4690-4707)

In November, 1968, the two Cities respectively adopted the 1968 Regional Airport Concurrent Bond Ordinance ("1968 Ordinance"), pursuant to which they sold $35,000,000 worth of revenue bonds. It is this public ordinance which the CAB carriers, as private parties, seek to invoke to force Southwest Airlines out of Love Field, even though the public body which adopted such ordinance, supposedly in the public interest, is foreclosed from so invoking it by final judgment.

The 1968 Ordinance adopted by Dallas represents the only relevant, legally significant action ever undertaken, by any federal or state governmental body or agency or, for that matter, by any private party, in an attempt to control and restrict the use of Love Field as such. Section 9.5 of this Ordinance makes it plain that such restrictions are not designed to enhance the public

convenience and necessity. nor to achieve safer and more efficient utilization of the air space. They are, purely and simply, designed to suppress free competition.

Section 9.5. Competition, Optimum Airport Development.

A. It is acknowledged and understood by the Cities that they, in *Love Field,* Redbird, GSIA and Meacham Feild, own and operate airports which by their nature are *potentially competitive with the operation of the Regional Airport.* It is further acknowledge and recognized that *the revenues to be derived from those airport facilities are not,* under the terms of this Ordinance, *pledged to the payment of the Bonds,* except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall *take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action) , to provide for the orderly, efficient and effective phase-out at Love Field,* Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport* effective upon the beginning of operations at the Regional Airport.

From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, *the Board may reasonably limit its scope and effect and may waive its application in specific instances* if it shall first determine that such action is necessary (1) in the interest of the *public saftey;* (2) in the interest of *prudent and efficient operations* at the Regional Airport; or (3) *in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole.* However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by

commercial air carriers, *the Board shall be authorized* to establish policies and *to make* uniformly applicable and non-discriminatory *agreements with air carriers regarding the instances if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. . . .*

B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means *promote the optimum development* of the lands and Facilities comprising the *Regional Airport* at the earliest practicable date, *thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to* the Regional Airport, *Love Field,* GSIA, Meacham Field or Redbird, *any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities* at the earliest practicable date; , , , (emphasis added) (R. 2195-97)

In two sections, this remarkable city Ordinance not only attempts to restrain trade and commerce in Dallas, but also purports to usurp the powers of the FAA, of the CAB, and of the TAC by permitting the Airport Board to authorize resumption of "Certificated Air Carrier Services" at Love in the interest of "public safety," "prudent and efficient operations," or " an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region. . . ;" provided, however, that the Airport Board has not earlier entered into a contrary, supervening agreement with the CAB air carriers "regarding the instances, if any, in which the above power granted to the Board will or will not be exercised. . . ."

The "Certificated Air Carrier Services" referred to in Section 9.5 are defined in Section 2.1 G of the 1968 Ordinance to include all of the services furnished by Southwest but only the "interstate" services of the CAB air carriers, leaving them free to provide unregulated intrastate air service from Love Field after Southwest's intended demise. This less than subtle distinction was found by Judge Taylor in *Southwest I* to constitute unjust discrimination, 371 F.Supp. at 1027-31 (Pet. App. 19d-27d); and was referred to by the Fifth Circuit in its first opinion as "this curious and unpleasant feature of the ordinance." 494 F.2d at 775, n. 2 (Pet. App. 3c)

In 1970, each of the CAB carriers serving the Dallas-Fort Worth area entered into a separate Letter Agreement with the Airport Board. Each such Letter Agreement provides that the particular carrier executing the Agreement will underwrite any deficit arising from the operation of DFW, including all operations and maintenance expenses and 1.25 times the annual debt service on the DFW revenue bonds. (R. 3691) This is a common arrangement, which is in effect in Houston and San Antonio, as well as at many other old and new airports throughout the country. It is called the "cash drawer" method of financing an airport and guarantees the municipal owner against any drain on its general tax revenues for airport expenses.

The "cash drawer" type of agreement provides, in essence, that all revenues received at an airport from all tenants, such as restaurants, gift shops, rent car agencies, engine repair facilities, airplane fuelers, and the carriers themselves for terminal space rentals, will go into a single "drawer" to be matched against total airport expenses. If there is an excess of expenses over revenues, then the deficiency is made up by increasing air carrier landing fees. Correspondingly, if there is an excess of revenues over

expenses, air carrier landing fees are decreased, refunded, or credited, as was recently the case at DFW. There is nothing novel, or even unusual, about the financing arrangements entered into between the CAB carriers and the Airport Board in order that the carriers might divest themselves of the onerous economic burden of serving, with jet equipment, two airports but twelve air miles apart. The only novelty here is that they are insisting that Southwest must help them with their project. A perfect analogy would be if a developer joint ventured an immense shopping mall with Gimbels and Woolco and then insisted that all the stores in town must rent space in order to help Gimbels and Woolco with the operating expenses and debt service they were carrying.

The Letter Agreements simply establish a mutually beneficial financing arrangement by which the CAB air carriers receive lower interest rates on the construction of needed airport facilities, because the bonds in question are tax free municipals, and the Cities are provided with suitable airport accommodations with a lessened financial risk on their part. (R. 1558; 1561; 1572-73; 1816) At the first Love Field trial, the attorney for the City of Dallas referred to the CAB air carriers as "partners" and the Director of Finance for DFW testified with respect to this arrangement as follows:

> Q. Isn't it true, Mr. Laman, that really what you have done out there at the Regional Airport is to make all of the [CAB] airlines a partner in the airport itself, in effect?
>
> A. That's correct. (R. 1758)

Under their "cash drawer" Letter Agreements, there may come a day when the CAB carriers pay no landing fees at DFW.

Furthermore, the contents of the individual and separate Letter Agreements, as they pertain to service requirements, are

not correctly quoted on page 4 of the Petition. Each CAB carrier, in its separate and individual Letter Agreement, agreed that "*it* shall move all of *its* Certificated Air Carrier Services serving the Dallas-Fort Worth area to the Airport, and thereafter shall conduct such services to, from and at the Airport to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance." (R. 3691) There is no requirement that *any other* carrier transfer its services to DFW as a condition to the effectiveness and enforceability of the Letter Agreement, and there is no requirement that the CAB carriers transfer their intrastate services to DFW, since the Letter Agreement simply imports the terms and conditions of the 1968 Ordinance, already discussed. As a matter of law, the financial interests of the CAB carriers in DFW are no different from those of the taxi drivers who serve the airport, the news vendors who sell newspapers on its premises, the bartenders who serve drinks in its bars, and the restaurants which serve meals in its precincts. Can all of these sue Southwest because they have "separate and distinct interests different from those of the general public?" (Pet., p. 3) If they can, the Court may be sure that the CAB carriers will put them to it.

At this point in the chronology, by the early 1970's, the CAB carriers had provoked the Regional Airport Investigation in order to relieve themselves of an uneconomic dual airport operation; the CAB obliged by stimulating the Cities to designate a single airport for interstate air service; the Cities resolved their civic differences by electing to construct DFW at Grapevine; each CAB air carrier voluntarily agreed to transfer its "Certificated Air Carrier Services" to DFW and to become a "partner" of the Cities by

paying any deficit at the new airport and receiving the benefit of any surplus; and, since all concerned were receiving just the economic benefits and cooperation they wanted from their partnership, there was complete harmony until Southwest began operations and the Cities and Airport Board, at the behest of their CAB partners, attempted to coerce it into the partnership through the instrumentality of the 1968 Ordinance.

Neither Southwest nor the TAC was ever consulted concerning DFW. It was either go along or be smashed. Southwest refused to sign a Letter Agreement and applied to the Airport Board for an exemption from, or waiver under, the 1968 Ordinance. The response was a lawsuit filed in the Northern District of Texas by Dallas, Fort Worth and the Airport Board. The TAC, representing the State of Texas and represented by the Attorney General of Texas, voluntarily intervened in the case, adopting the contentions of Southwest Airlines. Thus, both Texas sides to the dispute over the "internal regulatory systems" of Texas—the Cities and Airport Board, on the one hand, and the State of Texas, on the other—voluntarily submitted their conflict to the federal court, rendering nugatory any questions of "equity, comity and federalism."

Southwest filed numerous pretrial motions in the case, including one to hold it in abeyance for the want of indispensable or necessary parties; *viz.*, the CAB air carriers serving the Dallas-Fort Worth area. Southwest was concerned that it might, for perhaps the twentieth time, be faced with multiplicitous litigation over the same issue from its friendly competitors. The denial of its motion was a guarantee that it would not and that a favorable judgment would protect it against continuation of their predatory tactics.

The trial itself extended over three weeks, in the spring of 1973, and the truncated Appendix filed with the Circuit Court on appeal alone comprises 5,696 pages in seventeen volumes. The trial proceeding were observed throughout by representatives of the CAB carriers. The fact that the plaintiffs were also acting as agents of the CAB air carriers in bringing the lawsuit and in vigorously presenting this point of view is sharply brought home by Dallas' answer to Southwest's interrogatories nos. 16 and 17, which together asked in what respect, if any, Southwest's remaining at Love would, as alleged, impair plaintiff's ability to "manage, control and discharge the bonded indebtedness of the Dallas-Fort Worth Regional Airport?" The Cities noted that, among other considerations affecting their management of the joint municipal enterprise:

> ". . . Loss of access to numbers of emplaining passengers of this magnitude to *air carriers* operating out of the Dallas-Fort Worth Regional Airport over the same intrastate routes, and the loss of the supplemental revenues anticipated from the use by these passengers of Dallas-Fort Worth Regional Airport parking facilities and other concessions, could well jeopardize the ability of *air carriers* operating at the Dallas-Fort Worth Regional Airport to pay the contracted rentals, fees and charges, and such competitive operation of airports contrary to the contracts and ordinances of the Cities of Dallas and Fort Worth would impose insurmountable burdens upon *such carriers.* (emphasis added) (R. 1803-06)

The District Court rendered a most comprehensive and analytical opinion in favor of the TAC and Southwest Airlines on numerous grounds, both federal and state in nature, which considered all of the arguments advanced in support of the Concurrent Bond Ordinance, including loss of revenue to the CAB carriers. 371 F.Supp. 1015 (Pet. App. ld et seq.). In this

regard, the quotation from Judge Taylor's opinion appearing on page 14 of the Petition is seized completely out of context. There, the Court was refuting the obviously contrived and erroneous contention by the plaintiffs that Southwest's remaining at Love Field would visit financial horror upon the Airport Board, as such, and, consequently, upon the citizens of Dallas and Fort Worth. Judge Taylor's actual holding on the matter of alleged financial detriment appears on page 16d of petitioners' Appendix:

> Although not pleaded by Plaintiffs, this Court is not indifferent to the financial needs of the Regional Airport. However, the evidence which Plaintiffs have presented on this point is at best inconclusive, and its relevance to the fundamental legal issues in this case has never been explained. Financial necessity can neither legitimize an unjust discrimination nor augment the basic power of municipalities as granted to them by the State. Plaintiffs have wholly failed to establish that Southwest Airlines is required by law to remove its operations to the Regional Airport upon its opening . . .

Plaintiffs appealed the District Court decision to the Fifth Circuit Court of Appeals, and Delta, American, Continental and TI filed amicus curiae briefs on plaintiffs' behalf. The briefs filed by the CAB carriers did not raise one issue that had not been raised by the plaintiffs, both in the federal District Court and in their brief on appeal. Nor did the carriers' briefs treat any of the issues in a manner different from the plaintiffs. Most notably, neither Delta, American, Continental nor TI claimed in their briefs that it was improper for the federal District Court to decide state law or that it should have abstained from doing so, which was their principal contention, and afterthought, before the Fifth Circuit in this case. 546 F.2d at 90-93 (Pet. App. 9a-16a).

In the meantime, back in Dallas, other litigation was ripening that the petitioners' brief, on page 7, describes as "not presently relevant." Unfortunately for petitioners, however, such litigation is dramatically and damagingly relevant to their position in this case.

Southwest and the TAC had requested an injunction prohibiting plaintiffs from interfering with Southwest's right to use Love Field. Judge Taylor did not grant the injunction, expressing himself as confident "that Plaintiffs will abide by [the Court's] ruling in this case and not attempt to interfere with or burden Southwest's right to use Love Field . . ." 371 F.Supp. at 1035 (Pet. App. 34d).

While the Fifth Circuit appeal was pending, but after oral argument thereof, Ordinance No. 14,505 was introduced before the Dallas City Council. This Ordinance penalized Southwest up to $200 for each landing and takeoff at Love Field, for a possible maximum fine of $6,000 per day. Several fiery Council meetings followed at which Southwest denounced the Council for its perfidy; informed the Council that it was deliberately flouting the plain language of Judge Taylor's judgment; and requested the Council to obtain an outside legal opinion. However, the City Attorney not only gave the Council his opinion that Ordinance 14,505 would not violate Judge Taylor's order, but also suggested that the Fifth Circuit had requested passage of the Ordinance. It was passed.

Southwest immediately obtained a temporary restraining order against enforcement of Ordinance No. 14,505, at a hearing wherein Judge Taylor denounced the City Council for its willful and contumacious disregard of his judgment. American and Delta Airlines intervened in the injunction suit on behalf of the City of Dallas; filed extensive briefs in support of the City;

conducted the oral argument to the virtual exclusion of the City; and were parties at the time that a permanent injunction was entered against enforcement of Ordinance No. 14,505.[2]

In the meantime, the Fifth Circuit panel, consisting of Judge Gee, a Texas lawyer from Austin, Texas; Judge (now Attorney General) Bell from Atlanta, Georgia; and Judge Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation, unanimously affirmed the District Court decision in *Southwest I*, after deciding that Texas law was clear and that the TAC, and not the City of Dallas, had the right to determine whether or not Southwest could serve Love Field, so long as it remained open as an airport. To that end, the Fifth Circuit affirmed the trial court's holding that the 1968 Ordinance could not be enforced to exclude Southwest Airlines from Love Field. Judge Gee's opinion is set forth beginning at page 1c of petitioners' Appendix, and anyone who thinks that Texas law is unclear on this subject should reread it. The Texas Constitution and statutes alone ordain the result reached by the Fifth Circuit, excluding the added support of Texas cases and opinions of the Texas Attorney General. The constitutional and statutory language is plain and incontrovertible.

Next, the plaintiffs petitioned this Court for Certiorari in No. 74-324. They hired Erwin N. Griswold, former Dean of the Harvard Law School and Solicitor General of the United States, of the law firm of Reavis, Pogue, Neal & Rose, to represent them. Mr. Pogue is a former General Counsel and Chairman of the CAB, and the law firm formerly represented Eastern

[2] Southwest's suggestion that traditional principles of res judicata would not prevent the CAB carriers from litigating the validity of the ordinance, to which petitioners make reference, occurred in the course of a motion for summary judgment on the validity of Ordinance No. 14,505, since repealed by the City of Dallas.

Airlines; represented Pan American World Airways at the time of the filing of the Petition; and frequently jointly represents the major trunk carriers before the CAB. Plaintiffs also hired Mr. Charles S. Rhyne of the Washington law firm of Rhyne & Rhyne to represent them. And the CAB carriers got the Air Transport Association of America, representing all CAB certificated carriers, to file an amicus curiae brief on plaintiffs' behalf. Again, no new issues, or new thoughts on old issues, were presented, but certainly the plaintiffs could not be accused of being either niggardly or negligent in representing themselves and their CAB air carrier partners. Certiorari was denied.

Meanwhile, back again in Dallas, Texas, the CAB air carriers and the Cities, for public consumption, had filed damage claims against one another concerning their respective rights and obligations arising out of the DFW-Love Field conflict. They were, at one point, consolidated with the Southwest Airlines' injunction case directed at Ordinance No. 14,505, but the latter was subsequently severed from the consolidation.

Shortly after this Court denied Certiorari in Cause No. 74-324, in December, 1974, the air carriers and the Cities signed agreements voluntarily dismissing the federal case between them and trekked to the Austin State District Court, where, as heretofore described, the CAB carriers had previously achieved such spectacular success against Southwest that the Texas Supreme Court was compelled to issue a writ of prohibition against one of its trial judges. Since the dismissal, no more has been heard about withholding payment of landing fees at DFW or damage claims as between the Cities and the CAB air carriers.

In the Austin proceeding, a part of which was enjoined by the Court below, forming the basis for this Petition, the Cities,

with a certiorari denied final judgment against them, obviously could not do much affirmatively against Southwest. They had already performed their part, in any event, by agreeing to dismissal of the federal court suit with the CAB carriers. Everyone else ganged up against Southwest to throw it out of Love Field, citing the 1968 Ordinance as authority for this expulsion. Southwest did not "fully participate" in this case, as alleged on page 7 of the Petition. Instead, as permitted under Texas law, Southwest filed its pleas in abatement objecting to religitation of matters determined in *Southwest I,* and then set its pleas for hearing and briefed and argued them orally to the State district court, which rejected them. It was during this hearing that Continental's attorney, who also represents TI from time to time, or vice versa, informed the State district court judge that:

> Mr. Kelleher in his brief and to some extent in his argument talks about that this is an effort to undermine the federal court decision. That is not really an accurate characterization, Your Honor. This is a frontal attack on it. The word undermine implies something covert about it. We come in with flags flying. 396 F.Supp. at 683 (Pet. App.9b).

Having fully established on the record the ground rules of the game, Southwest applied to the federal court for an injunction prohibiting the CAB carriers from relitigating in state court the enforceability of the 1968 Ordinance against Southwest. Again, the State of Texas intervened on Southwest's behalf. A temporary restraining order and then a preliminary injunction were entered. The CAB carriers appealed the entry of the preliminary injunction to the Fifth Circuit, which resulted in the unanimous opinion written by Judge Wisdom and beginning on

page 1a of petitioners' Appendix. This Petition for a Writ of Certiorari arises from that decision.

REASONS FOR DENYING THE WRIT

In the decision below the Fifth Circuit, passing on the propriety of the District Court's grant of a preliminary injunction, violated neither the strictures of due process nor the restraints of comity. Rather, a unanimous panel, in a detailed opinion by Judge Wisdom, applied recognized concepts of representation to the particular facts of this case in affirming the order of injunctive relief. By so doing the Court of Appeals preserved that harmony between the federal and state sovereigns which is the object of the principle of comity and the goal of our federalism.

The Court of Appeals held that the petitioners here were bound by a prior judgment entered in a cause to which they were not formal parties, by the reasoned extension to the peculiar situation of this action of well-settled standards on the preclusive effect of judgments. The Court further held that an injunction against pending state court proceedings was permissible under the Anti-Injunction Act, 28 U.S.C. §2283, and the teachings of comity, on the basis of a correct reading of the prior abstention decisions of this Court. The opinion below represents the unexceptional application of prior decisions to a unique set of facts. Because the questions posed here were correctly decided below and because the unusual facts of this case make it an inappropriate vehicle for a general pronouncement from this Court on either res judicata or principles of comity, a writ should not issue to review this case.

1.Preclusion

Inherent in the principle, acknowledged by petitioners, that due process will, at some point, permit the operation of an earlier judgment as an estoppel on one not a party to the prior proceeding, is a recognition of the fact that the nature of the previous litgant, the identity of legal claims advanced, the similarity of relief sought, and the vigor of the earlier prosecution, may, in certain combinations, justify or require a court in the interests of sound judicial administration and fairness to the originally successful litigant, to hold that parties absent from the first action are nevertheless bound by its judgment. *Hansberry v. Lee,* 311 U.S. 32, 41-42 (1940). Federal and state courts have historically referred to this latter circumstance as a relationship of "privity" between the original and subsequent parties, and have precluded suits by parties and their "privies" to relitigate matters determined in a prior judgment. *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. 313, 320 (1971).

The opinion of Judge Wisdom has noted, and, petitioners concede, "correctly recognized,"[3] that privity "denotes a legal conclusion rather than a judgmental process." 546 F.2d at 95 (Pet. App. 19a). And the modern trend among courts and commentators, of which the decision below and the *Restatement*[4] drafts are an example, has been away from an attempt to fit the circumstances of a particular case into certain pre-ordained categories of privity relationships, and toward an individual analysis of the facts of each situation. The

[3] *Petition,* p. 10.

[4] *Restatement Second of Judgments,* Tentative Drafts No. 1 (1973), No. 2 (1975), N0. 3 (1976), and No. 4 (1977).

Restatement sections, comments and illustrations cited in the Fifth Circuit's opinion and the petition, are an effort, within the *Restatement's* necessarily categorized framework, to allow for the application of an estoppel in a second proceeding, despite the absence of a complete identity of parties, where the preclusion of further litigtion would serve the interests of stability and certainty of decisions, conservation of judicial resources, and the avoidance of harassing suits and conflicting judgments, without "compromising fairness"[5] to the would-be plaintiff in the particular case.

The federal courts[6] have for some time recognized that the factors calling for the preclusion of those not parties to an action are particularly likely to occur when a governmental body litigates the validity of its own statute or regulatory ordinance as applied to a particular enterprise. In such an instance, a judgment holding the statute unenforceable as to that party has been found to bind all who seek a subsequent enforcement of the same ordinance against the same party. *Berman v. Denver Tramway Corp.,* 197 F.2d 946 (10th Cir. 1952).[7] *See In Re Engelhard & Sons Company,* 231 U.S. 646

[5] *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. at 328 (1971).

[6] The Court of Appeals held that the preclusive effect of the federal judgment in *SouthwestI* must be determined as a matter of federal law. 546 F.2d at 94 (Pet. App. 17a). Petitioners do not dispute or seek review of this holding, rather, they describe it as "surely right." Petition, p. 9.

[7] The principle of preclusion by prior government representation is recognized in state law as well, including the law of Texas. As the Court of Appeals noted in the opinion below:

> Several states have adopted similar positions, including Texas, where citizens could not sue to prevent a railroad from moving its facilities once their city had already lost an identical suit. *See Hovey v. Shepherd,* 1912, 105 Tex. 237, 147 S.W. 224, *cited with approval, City of Palestine v. City of Houston,* Tex.Civ.App. 1924, 262 S.W. 215, holding that a city could properly represent its citizens' interests in litigation over the movement of railroad facilities.

546 F.2d at 98, n. 53. (Pet. App. 26a).

(1914); *Smith v. Illinois Bell Telephone Company*, 270 U.S. 587 (1926).

Writing of this Court's decision in *Re Engelhard & Sons Co., supra,* the opinion below noted that:

> [*Engelhard*] was a case in which the Supreme Court refused to allow a private party to intervene in a suit between a city and the local telephone company. The Court assumed that the city would vigorously pursue the action and would therefore adequately represent both the public and the subscribers to phone service. Although this case does not identify the type of relationship necessary for res judicata, it does deny a day in court both to members of the public and to private persons with pecuniary interests in the dispute. [8]

Faced in this case with the task of identifying the nature of the relationship between parties and causes of action "necessary for res judicata," the Court recognized three salient characteristics, present here and in earlier suits granting preclusive effect to prior government litigation.

> First, the CAB carriers do not claim a breach of legal duty by Southwest, apart from the alleged violation of the general duty to obey valid ordinances. Second, the carriers request the same remedy denied the City of Dallas, namely the enforcement of the phase-out provision of the ordinance to exclude Southwest from Love Field. Third, the ordinance does not establish a statutory scheme looking toward private enforcement of its requirements.[9]

[8] 546 F.2d at 98, n. 52 (Pet. App. 25a).

[9] 546 F.2d at 100 (Pet. App. 30a).

The Court of Appeals held that a prior unsuccessful judicial attempt by a governmental unit to enforce its own ordinance operated to preclude a subsequent suit by private parties where 1) the second suit did not rest on a personal legal right or claim peculiar to the private litigant; and 2) the identity of interest between the governmental litigant and the private party was exact, in that both sought the imposition of the same obligation arising from the same source on the same third party; and 3) the ordinance or statute in question did not itself establish a private scheme of enforcement independent of government action. With these factors isolated, it becomes apparent that the decisions of this Court alleged by petitioners to be in conflict with the holding of the Court of Appeals deal with situations quite different from that involved here.

In *Kersh Lake Drainage District v. Johnson,* 309 U.S. 485 (1940), cited by petitioners as "instructive" on the questions presented in this case, this Court held that in a suit brought by a local drainage district to collect taxes ordered assessed to pay the claims of bondholders, the individual landowners were not estopped from asserting their "personal and peculiar" claims of having been released from all such liability, despite a prior federal court adjudication of the district's collective liability to the purchasers of its bonds. The Court found that the district "did represent all landowners in unsuccessfully defending the certificate holders' suit for an adjudication of the total collective corporate obligation of the District as an entity," 309 U.S. at 494; but that the resolution of the general question could not dispose of the landowners' personal claims arising from an

independent legal basis. As this Court observed,

> Certainly, the decree in the injunction suit in the federal court would not prevent an individual property owner from subsequently interposing the defense that his property was not in fact included within the Drainage District. Cognate personal defenses, such as the one that a landowners' proportionate drainage tax liability has been declared by the judgment of a competent tribunal to have been "ascertained and paid", were not foreclosed by the Federal District Court's judgments.[10]

Far from undermining the decision below, *Kersh Lake* supports the Fifth Circuit's conclusion; and petitioners' contrary argument arises from a basic error in paraphrasing the decision. The Court did not find that the district's litigation failed to preclude the landowners because of the latter's personal and peculiar *financial interest* in the outcome of the litigation, as the petition clearly suggests. Rather the Court permitted the landowners to raise those legal claims which were peculiar to them, which did not derive from, and indeed had been won in suit against, the district. In *Kersh Lake* the subsequent private litigants sought to obtain relief on the basis of a legal duty owed to them apart from the general rights and obligations deriving from participation in the drainage district. To that extent alone were they permitted to assert their claims despite the district's earlier unsuccessful litigation. As to all questions concerning the general powers, rights, and duties of the district, the Court was clear in holding, and the petitioners here concede, that the district's federal court litigation bound all of the absent landowners.

So also in this case, the Court of Appeals held that as to the question of the rights, duties and obligations of the City of

[10] 309 U.S. at 494-95. [Footnotes omitted.]

Dallas, the petitioners are bound by the judgment in *Southwest I.* And, unlike the landowners in *Kersh Lake,* petitioners have advanced in their state court suit, no "personal and peculiar" legal basis for the exclusion of Southwest Airlines from Love Field; petitioners "do not claim a breach of legal duty by Southwest, apart from the alleged violation of the general duty to obey valid ordinances."[11] Indeed, to the extent petitioners seek the exclusion of Southwest Airlines on the basis of their "personal and peculiar" legal claims—claims that do not involve the enforcement of the 1968 Regional Airport Concurrent Bond Ordinance—they are not prohibited from doing so by the injunction affirmed below. That order, a copy of which appears as Exhibit A to this brief, is narrowly drawn to enjoin only litigation concerning "the validity, effect, or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of plaintiff Southwest Airlines Co. to the continued use of and access to Love Field . . . " [Appendix at A-5].

A similar confusion concerning the use of the term "interest" accounts for petitioners' argument that the opinion in *Trbovich v. United Mine Workers of America,* 404 U.S. 528 (1972), bears on the decision here. *Trbovich* involved a petition by an individual union member to intervene in a suit brought by the Secretary of Labor to set aside an election of union officers. In granting the petition, at least insofar as the individual member raised only those claims previously asserted by the Secretary, the Court found that the Secretary's dual obligation to protect the public's interest in fair union elections and the complaining union member's interest in his particular situation "may not always dictate precisely the same approach to the

[11] 546 F.2d at 100 (Pet. App. 30a).

conduct of the litigation,"[12] 404 U.S. at 539, and, consequently, intervention by the union member was appropriate to protect his potentially divergent interest in the outcome of the litigation. In *Trbovich* the Court was speaking to a variance of interests that went beyond the question of a personal stake in the litigation and raised the spectre of varying interests in the remedy to be obtained.

In contrast, the court below based its holding of preclusion in part on the fact that the position taken and the remedy sought by the City of Dallas in *Southwest I*—that the 1968 Ordinance operated to exclude Southwest Airlines from Love Field—coincided precisely with the petitioners' attempt to enforce the ordinance in the state court in order to expel Southwest Airlines from Love Field.[13]

Contrary to petitioners' implication, *Trbovich* does not argue for the necessity of separate suits whenever the litigants' financial stake in the enforcement of the law differs from that of the

[12] Similarly in *Patterson v. Burns*, 327 F.Supp. 745 (D. Haw. 1971), the district court permitted a private citizen to challenge an appointment to fill a legislative vacancy despite a prior attempt by the lieutenant governor, as the chief election official, to block the same appointment in the courts, because the lieutenant governor's paramount interest in upholding his own interpretation of the state election code had prevented him from advancing federal constitutional agruments against the contemplated procedure, which were available to the individual litigants. His primary interest in an interpretation of the Code itself had led to a strategy that deprived the private citizens of representation in the original suit. Further, as in *Kersh Lake*, the subsequent litigants sought to raise their "personal and peculiar" constitutional claims, which existed independent of the State of Hawaii.

[13] Moreover, as the opinior of the Court of Appeals notes, the due process question at issue here, unlike the intervention matter in *Trbovich*, is decided on the basis of the positions taken and the outcomes actually sought in the conduct of the original litigation. The courts below were not required, as was this Court in *Trbovich*, to speculate on a possible divergence between the positions of the governmental and private litigants, since they could and did examine in detail the *actual* conduct of the trial in *Southwest I* and could and did satisfy themselves as to both the vigor of the prosecution and the identity of legal interest. 546 F.2d at 102, n. 61 (Pet. App. 34a).

government representative—for so to argue would reject the concept of governmental representation in its entirety, which this Court has not sanctioned. Rather *Trbovich* speaks only to those situations, unlike the present case, in which different reasons for desiring enforcement may affect the kind of enforcement desired.[14]

The exhaustive Court of Appeals opinion demonstrates that the panel of the Fifth Circuit was fully aware of the due process implications of the decision which it rendered and was informed by this Court's basic pronouncement in *Hansberry v. Lee*, 311 U.S. 32 (1940). The Court of Appeals faced the precise argument advanced by petitioners here—that no matter how similar the legal interests and positions of the original governmental and subsequent private litigants might be, a private party with a particular financial stake in the success of the government's enforcement action cannot be precluded by a judgment against the government. This is not the teaching of *Kersh Lake* or *Trbovich*. And, as Judge Wisdom has forcefully noted, it is certainly not the holding of *Hansberry*.

> After adopting a case by case approach to examining the procedural protection, the Court held that preclusion on the facts of *Hansberry* violated due process. Not only were the defendants not parties or common law privies to the

[14] In this regard a comparison of the decisions in *Engelhard* and *Trbovich* is most instructive. In both cases this Court faced requests by private parties to intervene in suits brought by agencies of government. In *Engelhard* where, as in this case, the private parties sought merely to second the government's attempt to obtain enforcement of its own ordinance and no conflict existed in the remedies being sought, the Court found the government representation adequate, despite the peculiar financial interests of the erstwhile private litigants. In *Trbovich* the scales tipped toward intervention not because of the existence of individuals with a personal interest in the outcome, since that had been true in *Engelhard* as well, but rather the Court permitted the intervention of one who potentially sought an enforcement of the law different from that being pressed for by the government.

first action, but also their legal interests were not represented by the property owners who led the first class. The property owners in the first suit attempted to uphold the covenant while the defendants tried to invalidate it. Consequently, the class represented legal interests in direct opposition to the position of the defendants.

* * * *

The situation presented in *Hansberry,* therefore, is not presented here. The appellants assert the contrary by arguing that the interests of the cities in *Southwest I* differs from the pecuniary interests of the carriers. This argument misreads *Hansberry*, a case that looks to the congruence of the legal interests of the parties and non-parties not to their financial stake in the litigation. The pecuniary interest of the airlines is legally immaterial to the judgment of *Southwest I* as affirmed by this Court.[15] The judgment addresses the validity under Texas law of the 1968 ordinance, and on that issue no conflict exists between the cities and the CAB carriers.

546 F.2d at 101-02 (Pet. App. 33a-34a).

While this case might present a diverting academic squabble over whether a peculiar set of facts falls within a given subsection or comment of a particular tentative draft of the *Restatement,* it conflicts with neither the holding nor the spirit of this Court's earlier decisions on representation in general and preclusion by prior government litigation in particular. What has happened here is that the City of Dallas chose to litigate the validity of its ordinance in the federal court. The city lost that

[15] The legal irrelevance of the airlines' financial interest to the question of the power of the City of Dallas under federal and state law was a matter considered and noted by the district court in the original *Southwest* litigation. That decision did not ignore the CAB carriers' financial stake in the DFW airport, as the Petition suggests, but rather found, as did the Fifth Circuit, that it was legally immaterial to the validity of the 1968 Concurrent Bond Ordinance:

> Financial necessity can neither legitimize an unjust discrimination nor augment the basic power of municipalities as granted to them by the State. *City of Dallas, Texas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1026 (Pet. App. 16d).

suit when the federal district court declared that it could not bar Southwest Airlines from using Love Field, and that the ordinance, insofar as it would have that result, was invalid. That ordinance neither contemplated nor provided for private enforcement of its provisions.

Now, private parties have repaired to a state court and are attempting to convice that court to allow them to enforce that invalid ordinance against the very party the City was forbidden and enjoined by the federal court from enforcing the ordinance against.

It would be an affront to the dignity of the federal judicial system, and a perversion of all principles of comity and judicial efficiency to permit a state court to relitigate the enforceability of that ordinance against Southwest Airlines. Yet that is precisely what that part of the state suit which was enjoined by the court below seeks to do.

The ordinance has been once judicially declared to be invalid in a suit brought by the city. It therefore cannot be enforced by Dallas nor by anyone unless the federal court's declaration of invalidity against the City of Dallas is somehow avoided. This can only be done by flagrantly and with conscious indifference to the principles of both finality of judgments, and the federal court's jurisdictional right to hear questions of state law, allowing a state court to relitigate the very matter which the federal district court in *Southwest I* decided, the Fifth Circuit affirmed, and this Court declined to hear.

Thus, no principles of due process are violated by the lower court's injunction. The City is the only party with the power to enforce this ordinance. The City had its day in court in a forum

of its own choosing. It decisively lost. The ordinance is dead and no private party should be allowed to resurrect it through the guise of a state court suit asserting private rights which simply do not exist under the now defunct ordinance. Private parties cannot extract power from a municipal ordinance when the municipality which passed that ordinance has been judicially precluded from enforcing it. Since the petitioners have no other basis than the ordinance for evicting Southwest Airlines from Love Field, they can obtain no such relief in the state court suit unless the judgment in *Southwest I* is either ignored or violated. Petitioners' due process arguments do not, therefore, support review here.

2. Federal - State Relations

Petitioners advance their second argument for review of the decision below in this Court under the standard of "equity, comity and federalism." And though the precise point of this contention is never made clear, it appears to be an amalgam of two distinct ideas—both incorrect.

Petitioners first urge that the district court's original decision in *Southwest I,* affirmed by the Fifth Circuit in 1974, a case in which this Court has denied a petition for certiorari, was decided by the lower federal courts in contravention of prior Supreme Court abstention decisions. In *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 814-817 (1976), this Court had occasion to canvass the history of decisions requiring or sanctioning abstention. The Court there noted that "[o]ur decisions have confined the circumstances appropriate for abstention to three general categories." Two of those three circumstances—cases presenting federal constitutional issues which might be mooted or recast by a

decision of state law and criminal or closely related prosecutions undertaken in good faith—were not even arguably presented in *Southwest I;* and petitioners have based their entire abstention position on this Court's second category: cases "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.* at 814.

However, petitioners face two problems in attempting to fit the initial *Southwest* litigation into such a category. Most obviously, the original suit was not a proper candidate for abstention because the issues of state law presented were not difficult ones. Judge Wisdom's opinion considers at some length[16] the constitutional, statutory and case law of Texas upon which the district court and a prior panel of the Court of Appeals relied in determining that, as between the Texas Aeronautics Commission and the City of Dallas, the question of which controlled intrastate airline access to Love Field had a "simple answer."[17] In so holding the original Fifth Circuit panel was guided by the plain language of Texas constitutional and statutory provisions and the specific and recent direction of the Texas Supreme Court that "[t]he decision as to where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautics Commission."[18] Additionally, as petitioners apparently overlook, the Court of Appeals also relied on the guidance of previous Texas Supreme Court decisions denying to home rule cities the power to affect intrastate travel beyond their boundaries by closing off public trans-

[16] 546 F.2d at 90-93 (Pet. App. 9a-16a).

[17] *City of Dallas v. Southwest Airlines,* 494 F.2d 773, 776 (5th Cir. 1974). (Pet. App. 4c).

[18] *Texas Aeronautics Commission v. Braniff Airways, Inc.,* 454 S.W.2d 199, 201 (Tex. Sup. 1970), *cert. denied* 400 U.S. 943.

portation thoroughfares to public transport[19] and the opinion of the Texas Attorney General confirming the primacy of the Texas Aeronautics Commission in regulation of "for-hire air transportation" within a city's limits.[20]

Secondly, this case does not involve the kind of unwarranted and frequently unsettling federal intrusion into state regulatory schemes which *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and the other decisions in the second category of abstention were designed to prevent. For not only is the issue of state law well settled and uncomplicated, but the very controversy itself was brought to the federal court by three creatures of the State of Texas, the Cities of Dallas and Fort Worth and their joint Board, and voluntarily joined by the Texas Aeronautics Commission, a state agency—all invoking the federal question jurisdiction of the district court in an effort to resolve their controversy.[21] Rather than disrupting the state administrative process, the evil which *Burford* and its progeny were developed to guard against, *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959), the original Southwest decision came, as

[19] *City of Arlington v. Lillard*, 294 S.W. 829 (Tex. Sup. 1927); *City of Fort Worth v. Lillard*, 294 S.W. 831 (Tex. Sup. 1927).

[20] Op. Att'y Gen'l of Texas, September 2, 1969. Judge Gee's opinion affirming the grant of declaratory relief in *Southwest I* notes that the Attorney General of Texas has ruled that the TAC's powers "extend to routes entirely *within* one city.... Here, little but designating points of take-off and landing is involved." 494 F.2d at 776, n. 7. (Pet. App. 6c).

The Court has in past abstention decisions found the opinions of state attorneys general to be important factors in clarifying, or obscuring, questions of state law. *See, e.g., Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 30 (1959). Here, in contrast to *Thibodaux*, the Attorney General's opinion confirms and supports the language of the relevant statutes and no conflict of authority exists.

[21] This Court has previously indicated that, where the issues of state law are presented in a case brought under federal question jurisdiction, the abstention threshhold might well be higher than in mere diversity cases. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815, n. 21 (1976); *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, n. 5.

the Court of Appeals noted below, only after "state agencies themselves requested the federal decision," 546 F.2d at 93 (Pet. App. 15a). In this context Judge Wisdom observed that:

> . . . it cannot be said that a federal court disrupts harmonious relations with a state by responding to a request by the bickering state agencies to resolve their dispute.[22]

Petitioners move from the argument that abstention was required in *Southwest I* to the proposition that, given its dubious beginnings, the decision is particularly unworthy of the protection of an injunction against relitigation. However, given the absence of any valid ground for abstention in the original proceeding and the correctness of holding the petitioners bound in their enforcement suit by the city's previous unsuccessful effort, the propriety of the injunction against relitigation must be judged as it would be in any other case in which prior litigation has rested on state law grounds. As the Petition concedes, to deny such decisions the protection of an injunction against relitigation would undermine the very rationale behind the diversity and pendent jurisdictions of the federal courts; for the Petition itself recognizes that "[s]o long as diversity jurisdiction remains, it is workable only if a federal court is deemed competent to determine state law for purposes of a particular case."[23]

Nor does the injunction entered below extend the impact of the federal judgment beyond the boundaries of the "particular case." Contrary to petitioners' argument both to this Court and below that whole areas of state law have been removed from the jurisdiction of Texas state courts, the injunction, as the Court of

[22] 546 F.2d at 93 (Pet. App. 16a)

[23] Petition, p. 19.

Appeals repeatedly noted, will have no such effect:

> The district court injunction applies, quite narrowly, to relitigation of the Love Field controversy only as it affects Southwest. The CAB airlines can continue to litigate their rights to serve Love Field even if the injunction is affirmed. Because the CAB rather than the TAC regulates them, however, they will not be able to present a TAC-City of Dallas clash directly to the Texas courts. Nevertheless, another set of facts could present to the Texas courts the question of the relative powers of the TAC and local governments to regulate airports. The district court injunction would not reach such a case as long as the state decision did not attempt to contravene Southwest's rights under the 1973 judgment.
>
> * * * *
>
> Preventing this affront to the federal judgment will not preclude Texas courts from addressing the legal issues that underlie this dispute. Under *Pullman* and its progeny, the resolution of legal issues in *Southwest I* does not bind the Texas judiciary on those questions of law. In this case, we hold only that the CAB carriers cannot assail a federal judgment by relitigation in state courts. If the Texas courts or legislature should establish legal rules incongruous with the legal principles that controlled *Southwest I,* then relief from the federal judgment may be justified under Rule 60(b) of the Federal Rules of Civil Procedure. *See Glenn v. Field Packing Co.,* 1933, 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252; *Oliver v. Monsanto Co.,* S.D.Tex. 1972, 56 F.R.D. 370, *aff'd.,* 5 Cir. 1973, 487 F.2d 514; 7 Moore's Federal Practice ¶60.26[4] (1971); C. Wright and A. Miller, 11 Federal Practice and Procedure §2283 (1973). Of course, we do not reach the 60(b) question today. But we do suggest that by allowing the federal courts to determine the continuing effectiveness of their judgments, the Rule provides an approach more consistent with the above policies of federalism than the "frontal attack" launched by the CAB carriers in *Austin.* [24]

[24] 546 F.2d at 91, n. 19 and 93, n. 29. (Pet. App. 10a and 16a).

The district court that has lived with this controversy, in all of its permutations, since 1972, found that respondent faced the harassing and burdensome relitigation of matters clearly determined in an earlier suit brought and lost by a party legally entitled to represent the interests of the would-be plaintiffs in the instant case on the matters at issue here. On that basis the Court acted to prevent the injury to respondent and the disruption of federal-state relations inheent in a frontal attack on a federal judgment in state court. In this regard the situation here is most unlike *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1052 (6th Cir. 1977), in which the court declined to enter an injunction where it was doubtful that the original decision had touched the merits of the controversy and no indication of vexatious or harassing litigation existed. Indeed, far from violating either the letter of spirit of this Court's comity decisions, the order of the district court and the opinion of the Court of Appeals have simply preserved the integrity of a federal judgment on issues of state law in a particular case, while leaving the questions of state law open to any appropriate state adjudication in the future.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit correctly decided the relevant legal issues by application of existing precedent to a unique fact situation. The precise questions decided are unlikely to recur with any frequency and the decision below in no way prevents state court adjudication of the relevant issues of state law in subsequent proceedings between different parties.

For the reasons stated herein, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN L. HAUER
CLARICE M. DAVIS
WILLIAM M. BYRD, JR.
2800 Republic National Bank Bldg.
Dallas, Texas 75201

HERBERT D. KELLEHER
GARY A. BARRON
Suite 620, 711 Navarro
San Antonio, Texas 78205

Attorneys for Respondent
Southwest Airlines Company

CERTIFICATE OF SERVICE

I, John L. Hauer, attorney for Respondent Southwest Airlines Co. and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of August, 1977, I served three (3) copies of the foregoing document, in a duly addressed envelope, with airmail postage prepaid, as required by Rule 33(1) of this Court, upon each of the following counsel: Charles Alan Wright, 2500 Red River Street, Austin, Texas 78705, attorney for Petitioners; and J. David Hughes, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, attorney for Respondent Texas Aeronautics Commission.

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John L. Hauer

In The United States District Court
For the Northern District of Texas
Dallas Division

Civil Action No. CA 3-75-0340-C

Southwest Airlines Co.,
Plaintiff,

and

The Texas Aeronautics Commission,
Plaintiff-Intervenor,

v.

Texas International Airlines, Inc.; Delta Air Lines, Inc.; American Airlines, Inc.; Braniff Airways, Inc.; Ozark Air Lines, Inc.; Frontier Airlines, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; City of Fort Worth, Texas; City of Dallas, Texas; and Dallas-Fort Worth Regional Airport Board,
Defendants.

June 5, 1975

ORDER GRANTING PRELIMINARY INJUNCTION

There came on to be heard, this third day of April, 1975, with notice to, and appearance by the defendants herein, the application of plaintiff Southwest Airlines Co. for a Preliminary Injunction pursuant to Count One of plaintiff's verified Complaint, and from the specific facts set forth in said Complaint, the evidence introduced at the hearing by plaintiff and defendents, the argument and briefs of counsel, and from judicial notice of this Court's own records, the Court finds that:

1. This Court has previously held in Cause No. CA 3-5927-C, entitled "The City of Dallas, Texas, et al vs. Southwest Airlines Co. and the Texas Aeronautics Commission," that the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas may not legally be applied to exclude Southwest

Airlines from Love Field; and it ordered that the City of Dallas "may not exclude Defendant Southwest Airlines from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open"; said order was entered as a part of the Final Judgment in said cause on May 11, 1973, after a trial which began on March 26, 1973; and said order and Final Judgment remain in full force and effect, having been affirmed by the United States Court of Appeals for the Fifth Circuit, with mandate issuing on September 3, 1974, and petition for writ of certiorari having been denied by the United States Supreme Court on December 16,1974; and

2. Due to the attempt by the City of Dallas, subsequent to said May 11, 1973, final declaratory judgment, to exclude Southwest Airlines from Love Field while Love Field remained open, a permanent injunction was entered on February 10, 1975, whereby the City of Dallas was enjoined from "directly or indirectly, acting to exclude Plaintiff Southwest Airlines Co. from the use of Love Field, Dallas, Texas, and its airport facilities, so long as Love Field remains open as an airport;" the judgment of this Court granting said injunctive relief is final and no appeal has been taken therefrom; and

3. On December 10, 1974, one of the defendants herein, Texas International Airlines, Inc., filed a suit in a state court in Austin, Texas, in the District Court of Travis County, 200th Judicial District, styled No. 227,349, "Texas International Airlines, Inc. vs. The Dallas-Ft. Worth Regional Airport Board, et al," in which all of the parties to this federal suit are likewise parties, which seeks to interfere with the advantages resulting to plaintiff from the May 11, 1973, judgment of this Court, and which seeks to exclude Southwest from

Love Field while Love Field remains open by relitigating against Southwest Airlines Co. matters which were litigated, determined and adjudicated by this Court in Cause No. CA 3-5927-C. Specifically, Defendants seek in the Austin suit to relitigate the validity and enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas as a means of excluding Southwest Airlines from Love Field. Various of the other parties in said court suit also seek, by means of cross-actions and counterclaims, to relitigate those same matters, which were previously litigated, determined and adjudicated by this Court in Cause No. CA 3-5927-C, and to thereby exclude Southwest Airlines Co. from Love Field while Love Field remains open, through enforcement against Southwest of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas; and

4. It appearing to the Court that the defendants herein, parties to the state court suit, seek to enforce the 1968 Concurrent Bond Ordinance against Southwest Airlines, despite the fact that the validity and enforceability of said ordinance against Southwest Airlines was previously adjudicated by this Court against the Cities of Dallas and Fort Worth and the Dallas/Fort Worth Regional Airport Board in Cause No. CA 3-5927-C; and

5. It Further appearing to the Court that the public and all of the Defendants herein are prohibited from relitigating the validity, effect or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as said Ordinance may affect the right of the plaintiff Southwest Airlines Co. to continued use of and access to Love Field, so long as Love Field remains open, by the prior determinations of

this Court and of the United States Court of Appeals for the Fifth Circuit, in a suit brought by the Cities of Dallas and Fort Worth and the Regional Airport Board, that the Ordinance may not be enforced to exclude Southwest from Love Field, so long as Love Field remains open; and

6. It appearing that if said lawsuit in the District Court of Travis County, Texas, 200th Judicial District, is prosecuted to successful conclusion by Texas International Airlines, Inc., or by various of the other defendants by means of their cross-actions and counterclaims therein, or if plaintiff Southwest Airlines Co. is required to defend said lawsuit, Southwest will be deprived of the fruits and advantages of the May 11, 1973, order and judgment of this Court and will be irreparably injured by interference with its right of access to Love Field while Love Field remains open and will, regardless of the ultimate outcome of said state court suit, be subjected to multiplicitous and further vexatious litigation and its finances, customer and business relationships, and shareholder interests will also be adversely affected, and Southwest Airlines Co. will be damaged in an amount which cannot be determined with any reasonable exactitude; and

7. It appearing to the Court that if plaintiff's complaint herein were pending in this Court without interim injunctive relief, all of the defendants would rush to trial and judgment in the Austin suit and thereby force Southwest to relitigate the aforesaid matters, previously litigated, determined and adjudicated by this Court, the issuance of a Preliminary Injunction is needed to preserve the status quo of the parties which existed before the state court suit was filed. Plaintiff has no adequate remedy at law and the issuance of such Preliminary Injunction will cause defendants no harm.

IT IS, THEREFORE, ORDERED ADJUDGED and DECREED that plaintiff Southwest Airlines Co. is entitled to the Preliminary Injunction as herein granted, the same being within its allegations and prayer; and

IT IS ORDERED, ADJUDGED and DECREED that, pending a final determination on the merits of plaintiff's claim, the defendants Texas International Airlines, Inc., Delta Air Lines, Inc., American Airlines, Inc., Braniff Airways, Inc., Ozark Air Lines, Inc., Frontier Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., the City of Fort Worth, Texas, the City of Dallas, Texas, and the Dallas-Fort Worth Regional Airport Board are restrained and enjoined from litigating in Cause No. 227,349 in the District Court of Travis County, Texas, 200th Judicial District, or in any other court action, the validity, effect, or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of plaintiff Southwest Airlines Co. to the continued use of and access to Love Field, so long as Love Field remains open; provided that plaintiff shall, prior to the issuance of this Preliminary Injunction by the Clerk of this Court, file with the Clerk, a bond executed by it in the sum of $10,000.00, payable to defendants, with one or more good and sufficient sureties provided and conditioned as the law requires.

IT IS FURTHER ORDERED that this cause is set down for trial on the merits to be held before me on the 11th day of August, 1975, in the United States District Courtroom of Dallas, Texas.

ENTERED this 5th day of June, 1975.

/s/ W. M. Taylor

W. M. Taylor, Jr., Judge